

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

DAWN BERRY, Administrator for the
Estate of Brittany A. Berry, Deceased,

Plaintiff,

V.

No. 2:24 CV 25 CDP

MISSOURI DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

MEMORANDUM AND ORDER

Presently before the Court is plaintiff's motion for leave to file a third amended complaint, which was filed shortly after I dismissed several defendants from the second amended complaint without prejudice for plaintiff's failure to serve those defendants, and after I denied her motion to reconsider those dismissals. Review of the proposed third amended complaint shows that there are no changes from the second amended complaint other than changing the word "second" to "third" to describe the current iteration of the complaint, and the signature date of plaintiff's counsel. In view of there being no other changes, I agree with defendants that plaintiff's attempt to file a third amended complaint appears to be an attempt to circumvent the previous dismissal of the unserved defendants as well as my order denying reconsideration. However, as that earlier dismissal was without prejudice, I will grant plaintiff leave to file the third

amended complaint, but with limitations.

For the reasons set out in my Orders entered April 16, 2025 (ECF 44) and April 22, 2025 (ECF 46), I will limit the period within which to effect service of process of the third amended complaint to forty-five (45) days. With ample notice, plaintiff was given more than sufficient time to effect service of the second amended complaint, but she did not do so and she failed to show cause for her failure. I will not permit plaintiff to continually restart the ninety-day clock under Federal Rule of Civil Procedure 4(m) by refiling purported “amended” complaints for her own unexcused failure to comply with the Rule.


Given that nearly 150 days have passed since plaintiff filed her second amended complaint, and she made no changes in the third amended complaint, 45 days is sufficient time to effect service of the third amended complaint. Plaintiff is cautioned that failure to effect service within 45 days and file proof thereof will result in the dismissal *with prejudice* of any unserved defendant for failure to prosecute. *See* Fed. R. Civ. P. 41(b). *See also* *Wynn v. Gateway 2000, Inc.*, 18 Fed. App’x 449 (8th Cir. 2001) (per curiam); *Warner v. Dillard’s, Inc.*, No. 4:05CV664 MLM, 2006 WL 27429, at *1-2 (E.D. Mo. Jan. 5, 2006).

Accordingly,

IT IS HEREBY ORDERED that plaintiff’s Motion for Leave to File Third Amended Complaint [47] is **GRANTED**.

IT IS FURTHER ORDERED that plaintiff shall cause service of the third

amended complaint to be effected **within forty-five (45) days of the date of this Order.** Failure to effect timely service will result in the dismissal *with prejudice* of plaintiff's claims against any unserved defendant for failure to prosecute, without further notice.


CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 13th day of May, 2025.